serious claims against him in pending proceedings, which included moneys actually belonging to the company. The claims were disputed and would have to be established. Swinfen Eady J. refused to make the distribution. He set out the principle at page 247 which we would respectfully follow: —

"In my judgment the rule is of general application that where an estate is being administered by the court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him."

We accordingly allow the appeals with costs here and below. The orders made by D'Cotta J. on October 29, 1980 are set aside.

Appeals allowed.

Solicitors: *B. Mohan Singh & Co.; Goh, Chan & Co.; J.B. Jeyaretnam & Co.*

C.B.H. v. COMPTROLLER OF INCOME TAX

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.) October 22, 1981]

[Singapore — Civil Appeal No. 59 of 1981]

Revenue Law — Income Tax — Appeal against assessments — Whether gains from trade of property developer — Income Tax Act (Cap. 114), 10(1)(a).

The Comptroller of Income Tax by his additional assessments of July 27, 1972 assessed the appellant liable to tax in the sums of $82,127.14 and $179,146.60 for the years of assessment 1966 and 1968. The assessments were in respect of the appellant's income earned from his trade as a property developer and dealer and exigible under section 10(1)(a) of the Income Tax Act (Cap. 114). The Income Tax Board of Review affirmed the two additional assessments. The appellant's appeal against the Board's decision was dismissed by the High Court. The appellant appealed against the said decision of the High Court.

Held, dismissing the appeal: (1) the proper test to apply in this appeal is to ask whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion;

(2) in finding that the appellant was not holding the two pieces of land as investments in 1963 to 1966, the Board was in effect saying that the appellant was carrying on the trade of dealing with land, and was seeking planning permissions to enhance the eventual realised prices of those parcels. On these facts, it could not be said that the Board's finding was erroneous in law or based on insufficient evidence and therefore the Board's finding could not be upset on appeal.

Cases referred to:

(1) *International Investment Ltd.* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.

(2) *Edwards* v. *Bairstow* (1955) 36 T.C. 207, 229.

CIVIL APPEAL.

Lim Chor Pee for the appellant.

Nand Singh Gandhi (Legal Officer) for the respondent.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the judgment of the Court): The Comptroller of Income Tax by his additional assessments dated July 27, 1972 assessed the appellant liable to tax in the sums of $82,127.14 and $179,146.60 for the years of assessment 1966 and 1968. The assessments were in respect of the appellant's income earned from his trade as a property developer and dealer and exigible under section 10(1)(a) of the Income Tax Act, Cap. 114. The Income Tax Board of Review affirmed the two additional assessments. The appellant brought an appeal against the Board's decision to the High Court under section 81 of the Act. The learned judge in dismissing the appeal with costs expressed the view, after a careful consideration of the evidence and the grounds of decision of the Board, that there was ample evidence before the Board to justify its decision that the Comptroller was correct in raising the two additional assessments.

Against this decision, this appeal is brought before us.

The issue before the Board was whether the appellant's gains or profits of $177,174 and $360,591 earned in Singapore in 1965 and 1967 as a result of the sales of two portions of a larger piece of land which the appellant had bought in 1949 were gains or profits from the trade of a property developer and dealer within the meaning of section 10(1)(a) of the Act. On this question, the Board in its oral judgment concluded: "As to the issue whether the sale of the two properties was in the course of the appellant carrying out a trade or business in dealing with land, the answer is in the affirmative".

The proper test to apply in this appeal is to ask ourselves whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion. This approach was endorsed by the Privy Council in *International Investment Ltd.* v. *Comptroller-General of Inland Revenue.*[1] It is also a summary of what Lord Radcliffe said in *Edwards* v. *Bairstow*[2]:

"I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of

there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

It is essential to examine the evidence adduced before the Board. In 1949, the appellant, a businessman, purchased six pieces of land which totalled 131,168 sq. ft. at the price of $1 per square foot. Lot 96-2 Mukim XXV was by far the largest lot which abutted the south-western corner of the Tanjong Katong Road/Dunman Road junction. A Crown Reserve for road was lying between this lot and the other 5 lots known as Lot Nos. 103-106, 103-123, 103-199, 103-118 and 528 all of Mukim XXV which were situated to the west or south-west of the first lot. Immediately after the purchase the appellant consulted an architect in 1949. He showed him a site plan and sought advice on the type of houses he could build. He was advised that he could build terrace houses. He was also advised to buy the Crown Reserve from the Government, no doubt with the intention of amalgamating it with all the six lots and maximising the development potential of the property. In March 1951 the appellant applied to purchase the Crown Reserve of 33,236 sq. ft. and its purchase was finalised before the year ended.

In 1951 the appellant obtained permission to erect 30 flats on one block of ten 3-storey flats on that part of Lot 96-2 which was fronting Tanjong Katong Road. Construction of the flats was completed in 1953. The flats were rented out until the appellant sold them in 1972. No taxable income was produced throughout the 19 years when the flats were let out. During the second half of 1952, the appellant sought to amalgamate four out of the original six lots and sub-divide the amalgamated lot. In October 1952, the appellant obtained planning permission to amalgamate and sub-divide the new lots for development into, *inter alia,* (i) 17 lots for 2-storey flats, (ii) 6 lots for bungalows, and (iii) 10 lots for the 3-storey flats which were then under construction.

Between 1953 to 1957, the appellant submitted various applications for planning permission to develop the remaining portions of his properties other than Lots 528 and 103-118 which were situated at the western-most end of the entire piece along Dunman Road. In 1956, the appellant permitted the Shell Company of Singapore Ltd. to apply for planning permission to erect a filling station at the corner of the road junction. If this had been successful, the appellant would have sold the land to the petroleum company.

In 1957 the appellant obtained permission to erect 11 terrace houses on that strip of land on lot 96-2 Mukim XXV almost immediately behind the block of 30 flats. While the terrace houses were under construction, the appellant had advertised that they were for sale. He sold these terrace houses between 1958 and 1961. He did not derive any assessable income from these sales.

In 1963 the appellant submitted plans to build 24 flats on that portion of his property which abutted Dunman Road. His application was turned down. He re-submitted another application to build 56 flats and 4 shops on that portion of his land and on the portion to the south of the 30 flats along Tanjong Katong Road. He did not proceed with this development.

In 1965 the appellant sold a portion of his property for $193,000. The portion sold, after subdivision, was known as lots 568-40, 568-41 and 568-42 which were undeveloped and lying to the south of the 30 flats along Tanjong Katong Road. The appellant was assessed by the Comptroller to have made a profit of $177,174. In 1967 the appellant sold another portion of his land for $400,000, making a profit of $360,591. The second portion sold was situated along Dunman Road and was comprised in the original lot Nos. 528 and 103-117 and the new lot Nos. 568-1 to 568-10 which were new lot numbers given after the sub-division.

It was contended on behalf of the appellant that the Board had erred in law in not finding whether the appellant's intention to trade had existed at the time the land was acquired. After referring to the appellant's visit to the architect following the purchase, the Board stated: "clearly, the appellant at that stage, had the intention to develop his land in the best possible way." The appellant says that this finding is neither here nor there. He says it is innocuous: that the Board had not found specifically as a fact that the appellant had the intention or motive to trade. While this may be a possible reading of the sentence read in isolation, we are of the view that looking at all the evidence and the grounds of decision of the Board as a whole, the Board had considered, as it was required and entitled to, all the circumstances in which the land was acquired. The Board referred to the fact that the appellant had acquired the land with barely enough capital. The property was used almost immediately as security to raise a loan of $50,000 which was required to assist the appellant's cash flow in his import and export business. It was not acquired for the appellant's own personal use. Nor was it producing any income. The immediate consultation with the architect was to "develop his land in the best possible way."

The Board then considered the construction and retention of the block of 30 flats for some 19 years. But in spite of the extended period of renting out the flats, no assessable income was produced in any year of assessment.

The sales of the 11 terrace houses between 1958 to 1961 were also considered by the Board. Against this background, the Board specifically dealt with the appellant's assertion that he had the intention in 1963 to 1966 to develop the two portions subsequently sold by building flats or terraced houses on them and to hold them as investments. The Board stated:

"So then, the issue of fact for decision is this. Can the appellant be believed when he said that his intention from 1963 to 1966 was that he was going to develop the land by constructing flats or terrace houses, in the way he has described, to rent them, and therefore the whole exercise of development was an investment? In the way we have approached this case, our finding of fact is in the negative."

In finding that the appellant was not holding the two pieces of land as investments in 1963 to 1966,

the Board was in effect saying that the appellant was carrying on the trade of dealing with the land, and was seeking planning permissions to enhance the eventual realised prices of those parcels.

If the intention of the appellant was to hold the two parcels as investments at the time of their acquisition (which is not our finding), we are satisfied on all the evidence and are prepared to find that after the sales of the 11 terrace houses, the appellant had changed his intention and had regarded the two parcels as trading stocks to be sold as soon as the price is right. The appellant did not have the financial capability nor any plan to develop the two parcels with flats and terrace houses and hold them as investments.

In our opinion, on these facts it cannot be said that the Board's finding was erroneous in law or based on insufficient evidence and therefore the Board's finding cannot be upset on appeal. Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Chor Pee & Co.*

TAN TONG MENG CO. (PTE.) LTD. v. ARTIC BUILDERS & CO. (PTE.) LTD.

[O.C.J. (Rajah J.) June 8, 1981]

[Singapore — Originating Motion No. 31 of 1980]

Arbitration — Interim Award — Application to set aside, varied or remitted to Arbitrator — Remission Order — Misdirection by Arbitrator — Refusal by him to make available notes of evidence to counsel and to re-open case — Breach of rules of natural justice.

Administrative Law — Natural justice — Arbitration — Refusal of arbitrator to make available notes of evidence to counsel and to re-open case — Breach of rules natural justice amounting to misdirection on arbitrator's part.

By a written agreement dated November 15, 1975, the defendants agreed to erect and complete for the plaintiff a 19-storey apartment block. Clause 25(1) of the said agreement provided for the determination of the contract by the employer, i.e. the plaintiffs. On May 17, 1978 the plaintiffs' architects wrote to the defendants indicating dissatisfaction with the defendants' work and instructing the defendants to attend to certain defects in the building. On June 2, 1978, the plaintiffs' solicitors wrote the defendants' solicitors claiming damages for delay and terminating the contract forthwith. Reference was made to Clause 25(1). The dispute was then referred to a single arbitrator who made an Interim award on May 9, 1979. The plaintiffs sought to set aside, vary or remit to the Arbitrator the Interim Award on 5 grounds. The plaintiffs contended, *inter alia*, that the interim award did not deal with all the matters referred to by the Arbitrator for his decision. The remission went to the Arbitrator and he published his Findings pursuant to Order of Court of March 4, 1980. The plaintiffs then filed another Originating Motion to set aside, vary or remit the Interim Award as amplified by the Arbitrator's said Findings.

Held: (1) the Arbitrator misdirected himself when he said that for the purposes of the remission hearing, the notes of evidence, not having been made part of the Interim Award, could not be availed of by either party for clarification as to what happened at the original hearing. This refusal of the Arbitrator to make available the notes of evidence for clarification purposes to the plaintiffs resulted in the plaintiffs not getting the kind of hearing intended by the remission, that is to say, a fair hearing;

(2) it cannot be right in principle for an arbitrator to rely on or quote in justification of his award from a document which he had expressly excluded from his Interim Award and which he had refused the party adversely affected, a sight of;

(3) the Arbitrator's ruling not to re-open the case and to hear no further submissions as to what notices were given which satisfied termination under Clause 25(1)(b) amounted to a failure of justice;

(4) justice would be done between the parties if the award were set aside. It would be open to the parties to take such steps as they think fit to resolve their present dispute.

Cases referred to:-

(1) *Societe Franco-Tunisienne D'Armement-Tunis* v. *Government of Ceylon* [1959] 1 W.L.R. 787.

(2) *E. Rotheray & Sons Ltd.* v. *Carlo Bedarida & Co.* [1961] 1 Ll.L.R. 220, 225.

ORIGINATING MOTION.

P. Selvadurai for the plaintiffs.

C.S. Wu for the defendants.

Cur. Adv. Vult.

Rajah J.: By a written agreement dated November 15, 1975 made between the defendants and the plaintiffs the defendants agreed to erect and complete for the plaintiffs a 19-storey apartment block at Thomson Road on the terms and conditions therein contained.

Clause 25(1) of the said agreement provided for the determination of the contract by the employer, in the instant case the plaintiffs, and it reads as follows: —

"25(1) If the contractor shall make default in any one or more of the following respects, that is to say: —

(a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or

(b) If he fails to proceed regularly diligently with the works, or

(c) If he refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected, or

(d) If he fails to comply with the provisions of clause 17 of these conditions, then the architect may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

...."

On May 17, 1978, the architects in charge of the project under the contract acting under Clause 25(1) wrote to the defendants by A.R. Registered Post as follows: —

"M/s Artic Builders & Co. Pte. Ltd.
50 Somme Road,
Singapore 8.

Dear Sirs,

Contract Between Tan Tong Meng Co. Pte. Ltd. and Yourselves for Construction of One Block of 19-Storey Apartments on Lots 2461 MK.17 at Thomson Road, Singapore known as Tan Tong Meng Tower

We refer to our letters dated 24th and 27th April, 2 letters dated the 3rd May, and letters dated 13th May and 16th May 1978. Copies of these letters are attached hereto for your convenient reference.